89-852 (1)

No. 89-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

EMMA TAYLOR, *et al.*,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

James R. Pratt, III
(Counsel of Record)
HOGAN, SMITH, ALSPAUGH,
SAMPLES & PRATT, P.C.
2323 Second Avenue North
Birmingham, AL 35203
(205) 324-5635

Terry Nelson
HOPPE, BACKMEYER & NELSON
2nd Floor Concord Building
66 West Flagler Street
Miami, FL 33130
(305) 358-9080

Attorneys for Petitioners

CASILLAS PRESS INC. – 1717 K ST NW WASHINGTON DC 20036 – 223-1220

QUESTION PRESENTED*

Whether the court of appeals erred in ruling that Congress, in passing the National Traffic and Motor Vehicle Safety Act of 1966 and the minimum Federal Motor Vehicle Safety Standards promulgated thereto, intended to preempt state common law remedies for claims filed as a result of injuries or deaths caused by the defective design of motor vehicles in light of expressed Congressional intent that "[c]ompliance with any [such] standard . . . does not exempt *any* person from *any* liability under common law"?

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*Petitioners Emma Taylor and Charles Evans appeared as plaintiffs-appellants below. Respondent General Motors Corporation, American Motor Co. appeared as defendants-appellees below.

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OPINIONS BELOW

The opinion of the district court is unreported and appears in the appendix filed with this petition at Pet. App. 25a-33a. The opinion of the court of appeals is reported at 875 F.2d 816 (11th Cir. 1989) and appears at Pet. App. 1a-24a. The unpublished orders of the court of appeals denying reconsideration and rehearing *en banc* appear at Pet. App. 34a-35a.

JURISDICTION

The judgment of the court of appeals was issued on June 14, 1989. Pet. App. 1a-24a. The order denying rehearing *en banc* was entered on August 28, 1989. Pet. App. 34a-35a. On

November 2, 1989, petitioners filed a motion for extension of time within which to file a petition for writ of certiorari. On November 10, 1989, Justice Kennedy denied said motion. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, et seq., P.L. 89-563, 80 Stat. 718 ("Safety Act") provides in pertinent part:

> § 1391(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance . . . .
>
> • • • •
>
> § 1392(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Governement or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.
>
> • • • •
>
> § 1397(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does

not exempt any person from liability under common law.

Relevant excerpts from Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208, appear at Pet. App. 36a-39a.

STATEMENT

This is a diversity action filed pursuant to 28 U.S.C. § 1332, seeking damages under Florida law for the death of Charles Taylor who was killed in a front-end automobile collision while driving a 1980 General Motors Chevrolet, and Paula Evans who was killed in a separate front-end automobile collision while driving a 1977 Honda Accord. Their personal representatives brought this diversity action against the respective automobile manufacturers seeking damages under Florida tort law for the manufacturer's failure to equip the vehicles with airbags.[1] The manufacturers moved for dismissal on the ground that the plaintiffs' complaint failed to state a cause of action under Florida law or, alternatively, on the ground that their claims were preempted by the Safety Act and Federal Vehicle Safety Standard 208. The district court granted the motion to dismiss based upon the plaintiffs' failure to state a valid claim under Florida law.

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[1]The undersigned counsel of record, James R. Pratt, III, was recently associated for purposes of preparing and filing this Petition for Writ of Certiorari, and was not counsel for petitioners when the original complaint was filed. This action has a long and complicated procedural history which was not relevant to the issues raised in the district court, and which is not relevant to the issues raised in this Court. For purposes of this petition, suffice it to say that the district court allowed the defendants to file a joint motion to dismiss, and the court of appeals treated the order of dismissal as a single appeal.

On June 14, 1989, the court of appeals issued its decision holding that the district court erred in ruling that plaintiffs failed to state a claim cognizable under Florida law, but found that the plaintiffs' theory of recovery is impliedly preempted by the Safety Act and Federal Motor Vehicle Safety Standard 208.

The court of appeals' finding of preemption was based upon the belief that the presumption against preemption does not apply in an implied preemption analysis, and further, that this Court's holding in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, compels the finding of preemption.

Plaintiffs moved for reconsideration and rehearing *en banc*, but on August 28, 1989, these motions were denied. Pet. App. 34a-35a.

REASONS FOR GRANTING THE WRIT

The court of appeals in the instant case found that the Safety Act does not expressly preempt state common law remedies in design defect cases. Further, the court of appeals rejected the rationale of the majority in *Wood v. General Motors Corporation*, 865 F.2d 395 (1st Cir. 1988), instead upholding the clear and explicit language of the Safety Act in § 1397(c), wherein Congress provided for continuation of common law liability notwithstanding compliance with the minimum federal motor vehicle safety standards.

The court of appeals in the instant case did not apply the same logic and legal analysis to the implied preemption issue. Rather, the court of appeals created an exception to established crashworthiness law which ignores the clear and explicit language of § 1397(c), as well as the presumption against preemption. The court of appeals apparently felt compelled to create this exception based upon this Court's holding in *de la Cuesta*.

1. Congress Did Not Intend to Create an Exception to §1397(c) of the Safety Act, which Expressly Preserves All Common Law Claims, by Allowing the Minimum Federal Motor Vehicle Safety Standards to Permit Optional Means Of Compliance.

There are currently pending before this Court two petitions for Writ of Certiorari[2] which address the important federal question presented in this petition.

Since counsel of record for plaintiffs in the instant case has only recently been associated, and therefore had limited time within which to prepare this petition, and further, since the petitions in *Wood* and *Kitts* present essentially the same question presented herein, plaintiffs adopt the Reasons for Granting the Writ presented in those cases the same as if fully set out herein.

The statutory structure of the Safety Act clearly demonstrates that Congress did not intend to create an exception for Federal Motor Vehicle Safety Standard 208. The Safety Act defines *all* of the safety standards as minimum standards. *See*, 15 U.S.C. § 1391(2). Additionally, § 1397(c) by its very terms applies to *all* of the safety standards. Thus, Congress obviously intended to supplement all of the minimum federal safety standards, including 208, with the common law remedies preserved by § 1397(c) should a manufacturer's compliance with the minimum safety standards fail to make a motor vehicle reasonably safe. Further, Congress did not express anywhere in the Safety Act or in Federal Motor Vehicle Safety Standard 208 an intent that this standard should be

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[2]*Wood v. General Motors Corporation*, 865 F.2d 395 (1st Cir. 1988), *cert. pending*, No. 89-46 (1989); *Kitts v. General Motors Corporation*, 875 F.2d 787 (10th Cir. 1989), *cert. pending*, No. 89-279 (1989).

treated any differently than the other minimum standards in terms of its effect on the common law.

The failure of Congress to define Federal Motor Vehicle Safety Standard 208 specially or in a manner different from the other standards, or to exempt 208 from § 1397(c) defeats the argument that Congress intended to create an exception to its unambiguous preservation of common law remedies regardless of compliance with minimum federal safety standards.

2. There is a Presumption Against Preemption Absent Clear and Unmistakable Evidence Of Congressional Intent to Totally Occupy A Field of Safety to the Exclusion of The States. This Presumption Applies Not Only in Determining Whether There is Express Preemption, But Also in Analyzing Whether There is Implied Preemption.

The power to regulate local matters concerning health and safety has been traditionally reserved to the States. This Court has construed the Constitution as prescribing: "[W]e start with the assumption that the historic police powers of the states were *not* to be superseded by the Federal Act *unless that was the clear and manifest purposes (sic) of Congress.*"

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S.Ct. 1146, 1152 (1947). [Emphasis added.] And, when common law tort remedies are involved there is an even stronger presumption against preemption. *Id.*, 331 U.S. at 230. *See also, Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976).

This Court has never indicated that this presumption against preemption is limited to an express preemption analysis. Fur-

thermore, there is no logical reason why these principles should not also apply to implied preemption since the purpose and effect of preemption is the same regardless of whether it is implied or expressed. Accordingly, the emphasis should be whether Congress clearly intends to preempt rather than the means of preemption. The analysis to determine this intent should be consistent for both express and implied preemption.

The failure to apply a consistent analysis is demonstrated by the court of appeals' decision in the instant case. The lower court in its express preemption analysis construed § 1397(c) to indicate that Congress did not clearly and unequivocally intend to preempt the common law. Despite determining that § 1397(c) represented Congressional intent as to preemption, the lower court in its implied preemption analysis disregarded § 1397(c) and the presumption against preemption, finding that Congress did intend to preempt.

The court of appeals' refusal to apply the presumption against preemption was based upon this Court's holding in *Felder v. Casey*, 487 U.S. 123, 108 S.Ct. 2302 (1988). The *Felder* case does not involve expressed Congressional preservation of state common law remedies, nor does it hold that the presumption against preemption does not apply to an implied preemption analysis. In *Felder*, this Court held in essence that "where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Id.*, 108 S.Ct. at 2306. The instant case does not involve a federally created right, but rather, a federally preserved remedy.

Accordingly, if Congress intended to supplement minimum federal safety standards with common law remedies, which it expressly did, then the presumption against preemption not only applies, but also is consistent with expressed Congressional intent.

3. This Court's Holding in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, (1982) *Does Not* Compel a Finding of Preemption In the Case at Bar.

This Court in *de la Cuesta* construed the Homeowners' Loan Act of 1933 ("HOLA"), 12 U.S.C. § 1461, et seq. In HOLA, Congress empowered the Federal Home Loan Bank Board ("Board") to promulgate rules and regulations governing "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *People v. Coast Federal Sav. & Loan Ass'n.*, 98 F.Supp. 311, 316 (S.D. Cal. 1951).

Pursuant to these broad and all encompassing powers, the Board passed a regulation in 1976 governing due on sale clauses. This regulation, now 12 C.F.R. § 545.8-3(f) (1982)[3], was intended by the Board to be governed "exclusively by Federal law." 41 Fed. Reg. 18286, 18287 (1976).

There are fundamental differences between the expressed intent of Congress in the Safety Act and the regulations promulgated thereto, and in HOLA and the regulations promulgated thereto. There are also fundamental differences between the regulatory schemes utilized by these Acts.

First, HOLA did not contain a savings clause similar to § 1397(c) of the Safety Act, nor does HOLA expressly preserve common law remedies. Second, the due-on-sale regulation under scrutiny specifically and explicitly states that it is to be governed exclusively by federal law. Federal Motor Vehicle Safety Standard 208 contains no such statement, and pursuant to the terms of the Safety Act, is subject to § 1397(c), the savings clause. Finally, the regulatory scheme

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[3]The due-on-sale regulation was codified initially in 12 C.F.R. § 545.6-11(f) (1980).

of HOLA does not provide for minimum federal regulations supplemented by the common law, as does the Safety Act.

The *de la Cuesta* case involved circumstances under which there is impermissible and unintended conflict between a federal regulation (which by its own terms is the exclusive remedy) and state common law. The instant case may well involve tension between the federal regulation and state common law, however, unlike HOLA, that tension is permitted by Congress.

As this Court held in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615 (1984), there is no preemption if Congress intends to allow tension between federal regulations and states awarding damages based on state liability law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James R. Pratt, III
(Counsel of Record)
HOGAN, SMITH, ALSPAUGH,
SAMPLES & PRATT, P.C.
2323 Second Avenue North
Birmingham, AL 35203
(205) 324-5635

Terry Nelson
HOPPE, BACKMEYER & NELSON
2nd Floor Concord Building
66 West Flagler Street
Miami, FL 33130
(305) 358-9080

Attorneys for Petitioners

November 27, 1989

APPENDIX A

Emma TAYLOR, et al.,
Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION,
et al., Defendants-Appellees.

No. 87-5829.

United States Court of Appeals,
Eleventh Circuit.

June 14, 1989.

Terry S. Nelson, Miami, Fla., for plaintiffs-appellants.

Ronald M. Owen, Orlando, Fla., Harold Lee Schwab, New York City, for American Honda & Honda Motor.

R. Benjamin Reid, Miami, Fla., David M. Heilbron, San Francisco, Cal., for Gen. Motors.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, FAY and EDMONDSON, Circuit Judges.

TJOFLAT, Circuit Judge:

Charles Taylor and Paula Evans were killed in separate front-end automobile colisions while driving automobiles manufactured by General Motors Corporation and American Honda Motor Co.[1] The personal representatives of their respective estates brought this diversity action[2] against the automobile

[1]Taylor was driving a 1980 General Motors Chevrolet; Evans was driving a 1977 Honda Accord.

[2]*See* 28 U.S.C. §1332 (1982).

manufacturers, seeking damages under Florida tort law for the manufacturers' failure to equip the vehicles with airbags.[3] The manufacturers moved for dismissal on the ground that the plaintiffs' complaint[4] failed to state a cause of action under Florida law, or, alternatively on the ground that their claims were preempted by the National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. No. 89-563, 80 Stat. 718 (codified as amended at 15 U.S.C. §§ 1381-1431 (1982 & Supp. V

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[3]An airbag is an inflatable fabric cushion which remains concealed within the dashboard and steering column of an automobile until activated by the impact of a collision, when it rapidly inflates to cushion vehicle occupants from the forces of the collision. After the crash, the airbag quickly deflates to permit steering control or emergency egress.

[4]As indicated in the text, this case consists of two separate personal injury actions. The district court allowed the actions to be brought in a single complaint because the complaint contained a count which alleged that the manufacturers were jointly liable to each plaintiff under a theory of "enterprise liability," for conspiring with one another to prevent the installation of airbags in their automobiles. The district court subsequently dismissed this count for failure to state a claim for relief, and its ruling is not challenged in this appeal.

The complaint before us is the fifth amended complaint appellants have filed in this case. The original complaint was brought by Jodie Ziemba, who had been injured in a front-end collision while driving a Ford automobile. She sued Ford Motor Company, General Motors Corporation, and Chrysler Corporation to recover damages on behalf of herself and others injured in front-end automobile collisions. The first and second amended complaints added two new plaintiffs as well as additional defendants, including most of the automobile manufacturers selling cars in the United States. Upon motion by the defendants, the district court dismissed the second amended complaint and allowed plaintiffs thirty days leave to amend. The plaintiffs subsequently filed third and fourth amended complaints and filed a fifth amended complaint. The district court thereafter granted defendants' joint motion to dismiss that complaint with prejudice. All of the plaintiffs who were still in the case then appealed. Thereafter, all except the two appellants presently before us, dismissed their appeals. These two appellants now challenge the district court's rulings relating to their individual personal injury claims; they do not challenge the district court's refusal tocertify this case as a class action.

1987)) [hereinafter the Safety Act], and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (1980), promulgated under the Safety Act. The district court granted the motion without reaching the preemption issue. The plaintiffs now appeal. We affirm.

I.

We begin our review by determining whether appellants' complaint states claims cognizable under Florida law. Because no Florida appellate court has decided whether an automobile manufacturer can be liable for injuries sustained because if failed to equip an automobile with an airbag,[6] we must anticipate what the Supreme Court of Florida would do if presented with appellants' claims. *See, e.g., Nobs Chem., U.S.A., Inc. v. Koppers Co.*, 616 F.2d 212, 214 (5th Cir. 1980).[6]

Appellants seek to recover from the appellee manufacturers under two theories of tort liability: strict liability and negligence. We examine these theories in order.

A.

The Supreme Court of Florida has held that automobile manufacturers are answerable for damages in strict liability for

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[5]Florida's trial courts have come down on both sides of the issue. *Compare Martinez v. Ford Motor Co.*, No. 87-893 CW (Fla.Cir.Ct., Broward County, Aug. 15, 1988) (granting automobile manufacturer's motion for summary judgment); *Phillips v. Namie*, No. 85-33951-CA-7 (Fla. Cir. Ct., Dade County, Sept. 22, 1986) (same); *Ziemba v. Zirkle*, No. 84-10484-DB (Fla.Cir.Ct., Broward County, Jan. 7, 1986) (dismissing complaint) *with Lynch v. Mims*, No. GCG-85--0019 (Fla.Cir.Ct., Polk County, Aug. 20, 1985) (denying motion to dismiss); *Barfels v. Holman Imports, Inc.*, No. 85-1901-CB (Fla.Cir.Ct., Broward County, Sept. 1985) (same).

[6]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

design defects in their cars which, although playing no part in causing a primary automobile collision, nevertheless increase or bring about injury to occupants through secondary impacts against the interior of their cars during a collission. *See Ford Motor Co. v. Hill*, 404 So.2d 1049, 1050-51 (Fla. 1981). The court has recognized two theories of strict liability for such design defects. *See generally In re Standard Jury Instructions (Civil Cases)*, 435 So.2d 782 (Fla. 1983).

Under the first theory, an injured occupant may recover against the manufacturer if he demonstrates that, because of the automobile's design, it "fails to perform as safely as an ordinary consumer would expect." *Id.* at 783 n.* (quoting Report of the Committee on Standard Jury Instructions (Civil) of The Florida Bar). The automobiles in the instant case were equipped with seat belts, which were designed to prevent or minimize injuries to the driver caused by being propelled against the steering wheel, dash board, and windshield during a front-end collision. The appellants' decedents suffered their fatal injuries when they were thrown forward against such objects. Appellants, however, have not alleged in their complaint that their decedents' seat belts failed to function as intended, or that the injuries their decedents sustained were beyond those "an ordinary consumer" (wearing seat belts) would have expected; we therefore conclude that appellants seek no recovery under this first theory of strict liability.[7]

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[7]The manufacturers, however, in their briefs on appeal, assume that appellants seek damages under such theory and cite the following cases which, they contend, suggest that appellants' allegations fail to state a claim for relief. *See Higgs v. General Motors Corp.*, 655 F.Supp 22, 226 (E.D.Tenn.1985) (holding that consumer expectation test precludes a cause of action for failure to equip automobiles with airbags because, as a matter of law, the ordinary consumer would "not expect airbags to pop out of the dash"), *aff'd without opinion*, 815 F.2d 80 (th Cir. 1987); *see also Hughes v. Ford Motor CO.*, 677 F.Supp. 76, 78 (D.Conn.1987) (same); *Vanover v. Ford Motor Co.*, 632 F.Supp. 1095, 1098 (E.D.Mo.1986)

To recover under Florida's second theory of strict liability, an injured occupant of an automobile must show (1) that the injury he sustained as a result of the challenged automotive design would have been avoided, or less severe, had the manufacturer used an existing alternative design, and (2) that the enhanced danger posed by the challenged design outweighs the added cost, if any, to the manufacturer of the alternative design.[8] *See Cassisi v. Maytag Co.*, 396 So.2d 1140, 1145-46 (Fla.Dist.Ct.,App. 1981, *cited with approval in In Re Standard Jury Instruction (Civil Cases)*, 435 So.2d at 783 n.*. Appellants are proceeding under this second theory. In their complaint, they allege that their decedents would not have been so severely injured had the manufacturers equipped their cars with airbags as well as seat belts, that the manufacturers had the technology to make and install airbags, and that they could have equipped the decedents' automobiles with airbags at a reasonable cost. These allegations, if proven, would appear to make out a case of strict liability.

The district court, however, rejected appellants' strict liability claims because it believed that they could not prove their allegation that an automobile equipped with airbags and seat belts would protect a driver in a front-end collision better than an automobile equipped only with seat belts. In the court's

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(same). These cases are inapposite. They do not answer the question the manufacturers assume the appellants' allegations pose; that is, whether the driver of an automobile injured in a front-end collision states a claim for relief against the automobile's manufacturer if the driver alleges that the injuries he received were more serious than the injuries an ordinary consumer could have expected to receive under the circumstances.

[8]A number of other jurisdictions have similarly recognized this second theory of strict liability. *See, e.g., Mitchell v. Freuhauf Corp.*, 568 F.2d 1139, 1143-44 (5th Cir.1978) (applying Texas law); *Raney v. Honeywell, Inc., 540 F.2d 932, 935 (8th Cir.1976) (applying Iowa law); Barker v. Lull Eng'g Co.*, 20 Cal.3d 413, 432, 573 P.2d 443, 455-56, 143 Cal.Rptr. 225, 237-38 (1978); *Johnson v. Clark Equipment Co.*,274 Or. 403, 547 P.2d 132, 136 (1976).

words: "[S]eat belts and airbags are equally efficacious if seat belts are used." In its dispositive order, the court announced that it was granting the manufacturers' motion to dismiss appellants' claims because appellants failed to state a cause of action; actually, the court granted summary judgment for the manufacturers.

The only basis in the record for the district court's factual finding that seat belts alone are as effective as airbags is the following statement made by the Secretary of Transportation:

> Based on field experience through December 31, 1983, . . . the computed airbag and manual belt effectiveness (as used in the equivalent cars) for fatalities is now the same. This means that airbags would not save any more lives than the belt systems as used in those cars.

49 Fed.Reg. 28,962, 28,985.[9] This statement, which is contained in the Secretary's commentary on the Department of Transportation's 1984 amendments to the automobile safety standard relating to occupant crash protection, appeared in a brief filed by one of the manufacturers, Volkswagen of

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[9]The manufacturers urged the district court to find on two grounds that, as a matter of law, seat belts alone are as effective as airbags. The first ground was that appellants had admitted such in the brief they had filed in response to the manufacturers' motion to dismiss their fifth amended complaint. In that brief, appellants stated: "The National Highway Traffic Safety Administration estimates that with a [mandatory] seat belt or a passive restraint system, such as an airbag, 10,000 lives would be saved on a yearly basis." Having examined this statement within its context in the brief, we conclude that the statement is not an admission that seat belts and airbags are, in effect, the same; hence, the district court could not properly have drawn upon it to make its finding. Rather, we believe that the court relied upon the manufacturers' second ground, which was the statement of the Secretary of Transportation quoted in the text.

America, Inc., in support of the defendants' motion to dismiss appellants' complaint.[10]

We assume that the district court made its finding that "seat belts an airbags are equally efficacious" by taking judicial notice, pursuant to Fed.R.Evid. 201, of the Secretary's statement, as cited in Volkswagen's brief. For purposes of discussion we further assume that the factual recitation in the statement, "[b]ased on field experience through December 31, 1983, . . . the computed airbag and manual belt effectiveness . . . is now the same," is not subject to dispute. *See United States v. Pabian*, 704 F.2d 1533, 1538 (11th Cir. 1983) (Fed.R.Evid. 201(b) "requires that a judicially noticed fact be one 'not subject to reasonable dispute' in that it is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned' or is generally known."). Were this all that the Secretary had to say on the subject, one could argue that we whould uphold the district court's finding.[11] We do not uphold the finding, however, because the Secretary had much more to say about the relative effectiveness of airbags and seat belts.

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[10]Volkswagen filed the brief in support of the manufactgurers; motion to dismiss appellants' fifth amended complaint. *See supra* note 4. Appellee American Honda Motor Co., in urging us to accept as undisputed the district court's finding that seat belts are as effective as airbags, cites the same portion of the Secretary's statement that Volkswagen quoted in its brief to the court below.

[11]Even if this is all the Secretary had to say on the subject of the relative effectiveness of airbags and seat belts, and we were to conclude that the effectiveness figure is reliable, there are two reasons why the Secretary's statement would nonetheless fail to support the district court's finding that airbags and seat belts are equally effective in front-end collisions. First, the statement refers to field experience concerning all types of collisisons rather than isolating field experience concerning front-end collisions — the type that killed appelllants' decedents. Because airbags are effective only in frontal and near-frontal collisions and offer little or no protection in side-impacts, back-end collisions, or roll-overs, *see* 49 Fed.Reg. at 28,991, the

When the statement quoted in Volkswagen's brief is read in full context (with statements that were not quoted in the brief), it appears that seat belts may not be as effective as airbags. The Secretary stated as follows:

> *Because of limited field experience with airbags, estimating the effectiveness of these devices is very difficult. There are so few cars equipped with airbags and so few cases of serious or fatal injuries that the field experience has no statistical meaning.* Based on field experience through December 31, 1983, . . . the computed airbag and manual belt effectiveness (as used in the equivalent cars) for fatalities is now the same. This means that airbags would not save any more lives than the belt systems as used in those cars. *But because the data base is so small, we cannot place any confidence in this effectiveness figure.*

49 Fed.Reg. at 28,985 (emphasis added). At another point in her commentary, the Secretary stated that Allstate Insurance Company's statistics comparing the effectiveness of airbags and seat belts in crash tests revealed that "airbags are more effective than belts in protecting against head and facial injuries." *Id.* at 28,967. Then, in concluding her commentary, the Secretary had this to say:

> [Airbags and seat belts in combination] provide more protection at higher speeds than safety belts do [alone], and they will provide better protection against several kinds of extremely debilitating injuries (e.g., brain and facial injuries) than safety belts. They also generally spread the impact of a crash better

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cited field experience figures are not relevant for our purposes. Second, the field experience did not compare the effectiveness of airbags used in combination with seat belts and seat belts alone. Only such a comparison is relevant here because the complaint alleges that the manufacturers should be held liable for failing to *add* airbags to the decedents' automobiles which were already equipped with seat belts.

> than seatbelts, which are more likely to cause internal injuries or broken bones in the areas of the body where they restrain occupants in severe crashes.

Id. at 28,991. When we consider these additional observations concerning the efficacy of seat belts *vis-a-vis* airbags (or airbags used in combination with seat belts), we conclude that the district court erred in finding that, as a matter of law, seat belts are as effective as airbags and that appellants could not establish a case of strict liability under Florida law.

B.

We turn next to appellants' negligence claims. The Supreme Court of Florida has held that an automobile manufacturer has a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of collision. *See Ford Motor Co. v. Evancho,* 327 So.2d 201, 204 (Fla. 1976). In the context of the case before us, the question is whether the manufacturers had a duty to protect appellants' decedents from any of the injuries they sustained in their front-end collisions by equipping the decedents' automobiles with airbags in addition to seat belts. The district court answered this question in the negative.

In rejecting appellants' negligence claims, the district court, citing *Evancho,* stated that "Plaintiffs' argument amounts to imposition of a duty to 'foolproof a vehicle.'" We disagree. Although the court in *Evancho* observed that "manufacturers are not insurers and are under no duty to design a crashworthy, accidentproof, or foolproof vehicle," *id.* at 204, it recognized that the manufacturer is nonetheless required to take reasonable steps, within the limits of cost and technology, to design and produce an automobile that "minimize[s] or lessen[s] the injurious effects of a collision." *Id.* (quoting

Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968)). Appellants' complaint alleges that at the time the manufacturers designed and constructed the decedents' automobiles, the manufacturers knew that airbags were a technologically feasible and cost effective safety device that would probably lessen the potential for severe injury in a front-end collision. Requiring a manufacturer to add a known safety device, which is both technologically and economically feasible, is quite obviously not the same thing as requiring the manufacturer to build a "foolproof" vehicle. We therefore conclude that the allegations of appellants' complaint were sufficient to state a claim of negligence under Florida law.

In so concluding, we note that, contrary to the manufacturers' assertion, we are not the first federal circuit court to hold that a common law cause of action exists against an automobile manufacturer for failing to equip a vehicle with a form of passive restraints. In *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978), the Tenth Circuit found that Wyoming would recognize a cause of action in negligence against an automobile manufacturer for failing to cushion the backs of a vehicle's front seats in anticipation of a collision, which might cause the passengers to strike their heads against the backs of the seats. Such cushions, of course, constitute passive restraints, similar in effect to the airbag. *See* 49 Fed.Reg. at 28,965, 28,995 (discussing the proposed development of "passive interiors"). We accordingly hold that the district court erred in ruling that appellants failed to state a claim cognizable under Florida law.[12]

[12]Our holding is not inconsistent with that rendered by this court in *Evers v. General Motors Corp.*, 770 F.2d 984 (11th Cir.1985). In *Evers*, the plaintiff was involved in a side-impact collision and sought damages under Florida Tort law against the manufacturer of his automobile for its failure to equip the vehicle with airbags. We upheld the district court's grant of summary judgment for the manufacturer because that was no suggestion that airbags would have prevented injury in a side-impact collision. *Id.* at 986-87.

II.

Having found that the failure to provide airbags can serve as a basis for tort liability under Florida law, we must now decide whether such liability is preempted by federal law.[13] The Supremacy clause of the United States Constitution requires that all conflicts between federal and state law be resolved in favor of the federal rule. *See* U.S. Const. art. VI, cl. 2. The supremacy clause therefore prohibits the enforcement of any state law that conflicts with the exercise of federal power. *See, e.g., Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982).

Federal law may preempt state law in three ways. First, Congress, in drafting a statute, may use language that dictate the extent to which the statute preempts state law. Second, despite the absence of such language, the wording of the statute or its legislative history may evince Congress' intent to occupy a given regulatory field to the exclusion of state law. Third, even when Congress has not occupied the entire regulatory field, federal law nevertheless may implicity preempt state law to the extent that state law conflicts with a federal regulatory scheme. *See Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461,

[13]We note that the question of whether the Safety Act and Safety Standard 208 preempt common law claims for failure to provide airbags has produced a substantial divergence of opinion among the courts that have faced the question. Cases holding that the Safety Act and Safety Standards do not preempt state common law suits for failure to porovide airbags claims are preempted, see, *e.g., Staggs v. Chrysler Corp.*, 675 F.Supp. 1183 (D.S.D.1987) (same); *Baird v. General Motors Corp.*, 654 F.Supp. 28 (N.D.Ohio 1986) (same) Cox v. Baltimore County, 646 F.Supp. 761 (D.Md.1986) (express preemption); *Vanover v. Ford Motor Co.*, 632 F.Supp. 1095 (E.D.Mo.1986) (same). The only federal appellate court that has addressed this issue, the United States Court of Appeals for the First Circuit, held in a divided decision that the federal law impliedly preempts a state common law suit for failure to provide airbags. *See Wood v. General Motors Corp.* 865 F.2d 395 (1st Cir.1988).

469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984); *see also International Paper Co. v. Ovellette*, 479 U.S. 481, 494, 107 S.Ct. 805, 813, 93 L.Ed.2d 883 (1987).

The manufacturers contend that appellants' claims are foreclosed under the first type of preemption: according to the manufacturers, the language of the Safety Act expressly preempts appellants' tort claims. Alternatively, the manufacturers argue that the third type of preemption bars appellants' claims, contending that allowing appellants to prosecute their claims would frustrate the Safety Act's regulatory scheme.[14]

A.

Before addressing the manufacturers' two preemption arguments, it is helpful first to describe briefly the history of the Safety Act and the relevant Federal Motor Vehicle Safety Standards promulgated under that Act. The Safety Act was passed by Congress in 1966 in response to the "soaring rate of death and debilitation on the Nation's highways." *See* S.Rep. No. 1301, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S.Code Cong. & Admin.News 2709, 2709. Through the Safety Act, Congress sought to increase automotive safety by authorizing the promulgation of safety standards. *See* 15 U.S.C. §§ 1391(2), 1392(a) (1982). The responsibility for promulgating these standards was given first to the Department of Transportation and later to the National Highway Transportation Safety Administration (NHTSA). *See* Highway Safetey Act of 1970, Pub.L. No. 91-605, § 202(a), 84 Stat. 1713, 1739 (codified at 49 U.S.C. § 105 (1982)).

The safety standard here at issue, Standard 208, was first adopted in1967. This standard initially required the installa-

[14]The manufacturers concede that Congress did not intend to occupy the entire field of automotive safety; therefore, the second type of preemption is not applicable to this case.

tion of manual lap belts in all new automobiles. *See* 32 Fed.Reg. 2415 (1967). In 1972, NHTSA amended Standard 208 to require a gradual phase-in of passive restraints (i.e., airbags, padded interiors, or automatic seat belts) in all cars. For models made before August 1975, manufacturers were permitted to use manual belts with an ignition interlock system, which prevented a car from starting until the seat belts were fastened. *See* 37 Fed.Reg. 3911-12 (1972). Public outcry against this ignition interlock system prompted Congress in 1974 to amend the Safety Act. The amendment required NHTSA to rescind the ignition interlock standard. It also authorized NHTSA to adopt a standard that ***permitted*** manufacturers to install either passive restraint systems or manual belt systems; the amendment, however, prohibited NHTSA from issuing any standard that ***required*** manufacturers to install passive restraints, unless such a standard had been submitted first to both houses of Congress and not disapproved by them. *See* Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub.L. No. 93-492, § 109, 88 Stat. 1470, 1482 (codified at 15 U.S.C. § 1410b(b), (c) (1982)).

Consequently, NHTSA amended Standard 208 to delete the ignition interlock requirement. *See* 39 Fed.Reg. 38,380 (1974). As amended, Standard 208 granted manufacturers the option to install one of three restraint systems; passive restraints for front and lateral crashes; passive restraints for front crashes plus lap belts for side crashes and rollovers; or manual seat belts alone. *Id.* This is the version of Standard 208 that was in effect at the time the automobiles in this case were designed and manufactured. *See* 49 C.F.R. § 571.208 (1977) & (1980).[15] Appellants do not argue that these automobiles did

[15]Safety Standard 208 has been amended once again by NHTSA. The version of the Standard presently in effect requires manufacturers to equip all automobiles manufactured after September 1989 with passive restraints. *See* 49 Fed.Reg. 28,962-63, 28,991, 28,996 (1984) (codified at 49 C.F.R. pt. 571 (1987)).

not comply with the version of the safety standard in effect at the time of their manufacture. Rather, they allege, in effect, that the automobiles were defectively designed because the manufacturers chose the safety standard's seat belt option rather than its combination seat belt and passive restraint option.

B.

We turn now to the manufacturers' first preemption argument — that the Safety Act "on its face" expressly preempts state common law liability based on the failure to provide airbags. We begin our analysis of this issue by recognizing that a strong presumption exisxts against finding express preemption when the subject matter, such as the provision of tort remedies to compensate for personal injuries, is one that has traditionally been regarded as properly within the scope of the states' rights. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) ("[W]e start with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress."); *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-44, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963) (no preemption of state law regulating maturity of marketed avocados unless "Congress has unmistakably so ordained"). The task before us, then, is to determine whether the language of the Safety Act "unmistakably" manifests an intent to preempt appellants' common law claims.

In making their express preemption argument, the manufacturers rely principally upon the Safety Act's "Preemption" clause, which provides in part that:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no

> State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d) (1982). The manufacturers claim that this language preempts any state regulation, including a rule of common law,[16] that is not "identical" to the NHTSA safety standards which, at the time of the manufacture of the automobiles in this case, authorized manufacturers to install seat belts instead of airbags.

The Safety Act, however, also contains a "savings" clause, which provides:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Id. § 1397(c). This clause could be read as authorizing the prosecution of "any" common law claims, including those that might establish a rule not identical to the NHTSA safety stan-

[16]If appellants prevailed in their tort claims, the effect would be similar to that produced by a state regulation requiring automobiles to be equipped with airbags as well as seat belts. The imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause. As the Supreme Court explained in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.*, at 247, 79 S.Ct. at 780. In *Stephens v. American Brands, Inc.*, 825 F.2d 312 (11th Cir.1987), this court held that a state tort suit based on a theory of inadequate warning was preempted by the Federal Cigarette Labeling and Advertising Act because the suit had a regulatory effect.

dards. To reconcile the apparent conflict between the Safety Act's preemption clause and its savings clause, the manufacturers urge us to interpret narrowly the savings clause as preserving common law liability only for those automobile safety defects that are not specifically addressed by a Safety Standard.

Under the construction urged by the manufacturers, the savings clause is deemed merely to indicate that while the NHTSA safety standards are exclusive when they apply, they are not exhaustive. In other words, as one court has concluded, "the clear meaning of the [savings] clause is that compliance with the federal standards does not protect an automobile manufacturer from liability for design or manufacturing defects in connection with matters not covered by the federal standards." *Cox v. Baltimore County*, 646 F.Supp. 761, 764 (D.Md.1986). Such a construction, however, would render the savings clause a mere redundancy since the preemption clause itself provides that where a federal standard does not govern "the same aspect of performance" as the state standard, the state standard is not preempted. *See Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2d Cir.1969) (no preemption of a safety standard issued by Vermont Department of Transportation that regulated an aspect of performance that was not covered by the NHTSA safety standards). Because we have a duty to give effect, if possible, to every clause of a statute, *see United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 520, 99 L.Ed. 615 (1955), we are inclined to reject the manufacturers' construction since it would render an entire section of the Safety Act superfluous.

An additional factor militating against a finding that the language of the Safety Act expressly preempts appellants' claims is that Congress did not make explicit reference to state common law in the Act's preemption clause as it has in the preemption clauses of many other statutes. Congress has long demonstrated an aptitude for expressly barring common law

actions when it so desires. *See, e.g.*, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-17(d), -18(e) (Supp. V 1987) (preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. § 301(a) (1982) preempting rights "under the common law or statutes of any State"); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (1982) (preempting all state "laws, decisions, rules, regulations, or other State action having the effect of law"). The absence of such an explicit reference to state common law in the Safety Act's preemption clause therefore counsels against a finding of express preemption. *See Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir.1987) (adopting decision and reasoning of *Cipollone v. Ligget Group, INc.*, 789 F.2d 181, 185-86 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987), which held that failure of preemptive language in federal Cigarette Labeling and Advertising Act to include an explicit reference to state common law claims was grounds for concluding that there was no express preemption); *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C.Cir.) (same construction applied to Federal Insecticide, Fungicide, and Rodenticide Act preemption claim), *cert. denied*, 469 U.S. 1062, 105 S.Ct. 545, 88 L.Ed.2d 432 (1984).

The manufacturers urge us to attach little importance to this omission because, they claim, Congress in 1966 did not contemplate the possibility that a state tort action might exist that would effectively create a state design standard conflicting with a federal safety standard.[17] We find this argument unpersua-

[17]In 1966, the prevailing view was that automobile manufacturers had no duty to make their product safer to passengers in a collision. *See Evans v. General Motors Corp.*, 359 F.2d 822, 825 (7th Cir.) (holding that an automobile manufacturer has a duty to design its product to be reasonably fit for the purpose for which it was made and that purpose, as a matter of law, cannot contemplate the automobile's participation in a collision), *cert. denied*, 385 U.S. 836, 87 S.Ct. 83, 17 L.Ed.2d 70 (1966).

sive. A review of tort law circa 1966 reveals that crashworthiness litigation, "although then a relatively recent phenomenon, was not so new as to catch the Congress unawares." *Wood v. General Motors Corp.*, 865 F.2d 395, 421 (1st Cir.1988) (Selya, J., dissenting). While the seminal case recognizing that automobile manufacturers can be held liable for injuries due to the impact of occupants against objects inside a vehicle as a result of a collision, *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir.1968), was not decided until two years after the passage of the Safety Act, the doctrine did not emerge *ex nihilo*. Rather, the court in *Larsen* derived from existing cases and scholarly commentary what it deemed to be the next logical step in the evolution of design defect tort law. *See id.* at 504 (automotive industry not "being singled out for any special adverse treatment"; liability for design defects predicated upon established "general negligence principles"); *see also* Nader & Page, *Automobile Design and the Judicial Process*, 55 Calif.L.Rev. 645, 645 nn. 3, 4 (1967) (recognizing that by 1966 automobile crashworthiness suits were occasionally settled, and sometimes successful at the trial level).

Given the conflict between the language of the Safety Act's preemption and savings clauses, and the failure of Congress explicitly to include reference to state common law in the Act's preemption clause, we conclude that the Safety Act cannot be construed as unambiguously manifesting an intention to preempt appellants' common law claims. We therefore hold that appellants' claims are not expressly preempted by the Safety Act.[18]

[18]We conclude only that the language of the safety Act is too ambiguous to manifest a Congressional intent to preempt appellants' common law claims under an express preemption analysis; we do not find to the contrary — that the Safety Act's savings clause unmistakably manifests an express intention on the part of Congress to preserve appellants' common law claims.

C.

Having found that the language of the Safety Act does not expressly preempt appellants' tort claims, we turn next to whether congressional intent to preempt appellants' claims may be inferred under the principles of implied preemption. Our analysis begins with the principle that federal law preempts state law when state law creates "a potential frustration of the administrative scheme provided by [the federal law]," *Howard v. Uniroyal, Inc.*, 719 F.2d 1552, 1562 (11th Cir.1983), or when the state law "interferes with the methods by which the federal statute was designed to reach [its] goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S.Ct. 805, 813, 93 L.Ed.2d 883 (1987). This principle of implied preemption applies whether the federal law is embodied in a statute or a regulation, *see Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 78 L.Ed.2d 664 (1982) (holding that "[f]ederal regulations have no less pre-emptive effect than federal statutes"), and whether the state law is rooted in a statute, regulation, or common law rule. *See Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir.1987) (adopting decision and reasoning of *Cipollone v. Ligget Group, Inc.*, 789 F.2d 181, 187 (3d Cir.1986), *cert. denied*, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987), which held that "the duties imposed through state common law damage actions have the effect of requirements that are capable of creating an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

There are two important differences between the analysis we employ in determining whether a state law is expressly preempted by federal law and that which we use in approaching questions of implied preemption. First, in contrast to the strong presumption against preemption that we apply in determin-

ing whether the language of a federal statute or regulation expressly preempts state law, no such presumption is applicable in deciding whether state law conflicts with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights. *See Felder v. Casey*, ____ U.S. ____, ____, 108 S.Ct. 2302, 2306, 101 L.Ed.2d 123 (1988) ("'[T]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'") (quoting *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962)).

The second difference between express and implied preemption analysis is that in implied preemption analysis it is possible to infer preemptive intent solely from effects. Even where the preemptive intent behind the federal regulatory scheme is unclear form its statutory language or legislative history, the federal law nevertheless preempts the state law to the extent that the ordinary application of the two laws creates a conflict. *See Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501, 104 S.Ct. 3179, 3185, 82 L.Ed.2d 373 (1984) (Where there is an "actual conflict" between federal and state law, the state law "is preempted by direct operation of the Supremacy Clause.").

We now examine the effect that permitting appellants to prosecute their claims would have on the federal regulatory scheme involved in this case. In its 1974 amendment to the Safety Act, Congress expressly approved the right of an automobile manufacturer to comply with the Safety Act either by installing manual seat belts or passive restraints. *See* Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub.L. No. 93-492, § 109, 88 Stat. 1470 (codified at 15 U.S.C. § 1410b

(1982)). Consistent with Congress' 1974 mandate, the regulations promulgated under the Safety Act authorized automobile manufacturers to choose one of three different methods to comply with the safety standards for occupant crash protection, one of those federally approved options was the installation of manual seat belts. *See* 39 Fed.Reg. 38,380 (1974). Congress subsequently endorsed the option authorized in the federal regulation by providing in 1978 and again in 1979 that "[n]one of the funds appropriated [for the Department of Transportation] shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system)." Department of Transportation and Related Agencies Appropriations Act, 1979, Pub.L. No. 95-335, § 317, 92 Stat. 435, 450 (1978); *see also* Department of Transporation and Related Agencies Appropriation Act, 1980, Pub.L. No. 96-131, § 317, 93 Stat. 1023, 1039 (1979).

In pressing their implied preemption arguments in this appeal, each side relies extensively on the legislative history of the Safety Act and Safety Standard 208. As is often the case with legislative history, however, both sides have succeeded in gleaning passages that bolster their contrary positions.[19] Although the ultimate intent of Congress may be indiscernible, the effect of the regulatory scheme established by the 1974 amendment to the Safety Act and Safety Standard 208

[19]For example, the manufacturers cite passages in the legislative history suggesting that Congress intended that the standards governing crash protection be uniform throughout the country. *See, e.g.*, H.R.Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966); 112 Cong.Rec. 14,232, 14,253 (1966). Appellants counter by citing passages suggesting that the reduction of traffic fatalities was the overriding concern of Congress. *See, e.g.*, S.Rep. No. 1301, 89th Cong., 2d Sess. 6, *reprinted in* 1966 U.S.Code Cong. & Admin.News 2709, 2714. No materials, however, have come to our attention that can be deemed dispositive of the issue of Congress' preemptive intent.

is unmistakable: it grants automobile manufacturers the option of complying with federal standards for occupant crash protection by installing manual seat belts instead of airbags.

The Supreme Court has held that, under the principles of implied preemption, a state cannot impose commonlaw damages on individuals for doing what a federal act or regulation "authorized them to do." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, 101 S.Ct. 1124, 1131, 67 L.Ed.2d 258 (1981); *see also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524, 101 S.Ct. 1895, 1907, 68 L.Ed.2d 402 (1981) (holding that the Employee Retirement Income Security Act of 1974 preempted state law which "eliminates one method for calculating pension benefits [ ] that is permitted by federal law"). The Supreme Court's opinion in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982), demonstrates the rule. In that case, a federal regulation permitted federal savings and loan associations at their option to include a due-on-sale clause in loan instrumetns, and the defendant federal savings and loan association exercised its option to include the clause. Plaintiff borrowers sued the association for damages, and claimed the due-on-sale clause in their loan instrument was unenforceable under a rule of California commonlaw. The Supreme Court held that the federal regulation preempted the California common law because the common law rule prohibited the exercise of the federally authorized option:

> The conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. The Board consciously has chosen not to mandate use of due-on-sale clauses "because [it] desires to

> afford associations the flexibility to accommodate special situations and circumstances." 12 C.F.R. § 556.9(f)(1) (1982). Although compliance with both § 545.8-3(f) and the [state common law] rule may not be "a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. [132] at 142-43, 83 S.Ct. [1210] at 1217 [10 L.Ed.2d 248 (1963)], the California courts have forbidden a federal savings and loan to enforce a due-on-sale clause solely 'at its option" and have deprived the lender of the "flexibility" given it by the Board.

Id. at 155, 102 S.Ct. at 34023. (footnote omitted).

de la Cuesta governs this case. It holds that a state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option. *See id.* In accordance with *de la Cuesta*, we conclude that a state common law rule that would, in effect, remove the element of choice authorized in Safety Standard 208 would frustrate the federal regulatory scheme. We therefore hold that appellants' theory of recovery is impliedly preempted by Safety Standard 208 and the Safety Act.[20]

III.

In sum, we find that Florida's tort law doctrines of strict liability and negligence would recognize a claim against a manufacturer for its failure to equip an automobile with air-

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[20]In so holding, we reject the appellants' argument that the Safety Act's savings clause forecloses a finding of implied preemption. *See Wood v. General Motors Corp.*, 865 F.2d 395, 415-16 (1st Cir. 1988) (citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987), and *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907), for the proposition that a "general" savings clause, such as that contained in the Safety Act, does not preclude a finding of implied preemption.

bags, but hold that such a claim is preempted by federal law. We therefore affirm the district court's dismissal of appellants' suit.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-6467-CIV-ROETTGER

EMMA TAYLOR, et al,
Plaintiffs,

vs.

FORD MOTOR COMPANY, et al,
Defendants.

_____/

Plaintiffs have filed a class action, suing most of the car manufacturers of the western world for failure to install air-bags. This Order deals with Plaintiff's *Fifth* Amended Complaint. Defendants, FORD MOTOR COMPANY, et al, have moved the Court for Reconsideration of Defendants' Motion to Dismiss Plaintiffs' Fifth Amended Complaint.

Upon considedration of the record in this cause, it is

ORDERED AND ADJUDGED that:

1. Defendants' Motions for Reconsideration of their Motions to Dismiss are GRANTED.

2. Upon reconsideration of Defendants' Motion to Dismiss, said motions are GRANTED. Plaintiffs' Fifth Amended Complaint is DISMISSED WITH PREJUDICE.

There are numerous bases supporting dismissal of Plaintiffs' Fifth Amended Complaint. This Order will address each basis.

First, this court lacks subject matter jurisdiction.

Plaintiffs assert jurisdiction based solely upon diversity of citizenship. When jurisdiction is based solely on diversity, a plaintiff must show more than $10,000.00 in controversy. 28 U.S.C. § 1332(a).

Plaintiffs denominate their claim a class action pursuant to Rule 23(b)(3). *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) states the standard by which Plaintiffs' Complaint must be assessed: "*Each plaintiff* in a Rule 23(b)(3) class action must satisfy the jurisdictional amount . . . ." *Zahn, supra.* at 301 (emphasis added).

Plaintiffs claim to represent a class of persons who are Florida residents, drivers or front seat passengers who were not wearing seat belts, injured within the last four years in front-end automobile accidents and riding in vehicles manufactured within the past twelve years. *Zahn* mandates that each and every member of this purported class have a claim in excess of $10,000.00. Plaintiffs' Fifth Amended Complaint does not satisfy *Zahn*.

Plaintiffs have attempted in their Fifth Amended Complaint to conform to *Zahn* by limiting the class to those previously described persons "whose damages each exceed $10,000.00 . . . ." Plaintiffs' attempted class limitation is exactly the type of description which was at issue in *Zahn* and which *Zahn* forbids.

Plaintiffs' description necessarily entails a case-by-case determination by the court before trial as to which unnamed class members actually have claims in excess of $10,000.00. *Zahn* forecloses such a case-by-case determination and mandates dismissal if it does not appear from the face of the complaint that each and every class member, named and unnamed, satisfies the jurisdictional amount. Plaintiffs' Fifth Amended Complaint does not comport with *Zahn's* jurisdictional require-

ment and is therefore DISMISSED for lack of subject matter jurisdiction.

Second, the class action device attempted by Plaintiffs in this cause does not meet the requirements of Rule 23(b)(3) and thus may not be maintained as a class action.

Rule 23(b)(3) provides that an action may be maintained as a class action if, *inter alia*, the class action device is "superior to other available methods for the fair and efficient adjudication of the controversy." The case-by-case determinatioin necessary to ascertain subject matter jurisdiction in this cause, as discussed in the first point of this Order and as prohibited by *Zahn*, also defeats the superiority requirement of Rule 23(b)(3).

Determining the boundaries of jurisdiction in a cause where, by Plaintiffs' own estimate, 25,000 people *might* have claims in excess of $10,000.00 makes the class action device particularly unsuitable and certainly not the "fair and efficient" alternative to individual actions that Rule 23(b)(3) requires a class action be. *See White v. Deltona*, 66 F.R.D. 560, 563-64 (S.D. Fla. 1975) (745 individual determinations would not make for "efficient adjudication"); and see *Roberts v. Cameron Brown Co.*,, 72 F.R.D. 483, 488 n. 5 (S.D. Ga. 1975), *rev'd on other grounds*, 556 F.2d 356 (5th Cir. 1977). (class action certified in mortgage case because "in every instance . . . well in excess of $10,000.00" was evidenced on the face of the mortgage notes).

Even if *Zahn* were no bar, Rule 23(b)(3) forecloses maintenance of this cause as a class action because Plaintiffs cannot show that the class action device is superior to other methods of adjudication. Plaintiffs' Fifth Amended Complaint is therefore DISMISSED for failure to satisfy Rule 23(b)(3).

Third, Plaintiffs' Fifth Amended Complaint does not state a claim under Florida law.

Count I of the Complaint alleges strict liability, Count II alleges negligence and Count III alleges joint liability, all for failure to install airbags. Although the Florida Supreme Court has not addressed any of the three issues, this court feels that no Count states a claim cognizable in Florida.

COUNT I AND STRICT LIABILITY

Florida adopted the doctrine of strict liability as stated by the Restatement (Second) of Torts § 401, in *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80, 87 (Fla. 1976). Strict liability may be imposed if a plaintiff is injured by a product which is "unreasonably dangerous." *West, supra*, at 87.

A product is not unreasonably dangerous simply because a plaintiff can show an alternative design or even a safer product. *Husky Industries, Inc. v. Black*, 434 So.2d 988, 991 (4th D.C.A. 1983). Manufacturers are not insurers, nor do manufacturers have a duty to make products accident-proof. Rather, manufacturers have a duty to produce a product that is not "unreasonably dangerous." *Husky, supra*, at 991.

Plaintiffs admit in their response of March 6, 1987, that seat belts and airbags are equally efficacious if seat belts are used. Plaintiffs assert, however, that some persons do not choose to wear seat belts and, therefore, Defendants have a duty to install airbags to protect those persons who don't use seat belts.

Plaintiffs obviously state a preference for airbags over seat belts. Plaintiffs' preference amounts to an alternative design which is as safe or (arguably) safer than the design at issue. However, Plaintiffs' preference does not amount to a show-

ing that vehicles with seat belts but without airbags are unreasonably dangerous. Plaintiffs have not stated a claim in strict liability and Count I is therefore DISMISSED.Accord, Evers v. General Motors Corp., No. 81-1108-CIV-T-GC (M.D. Fla. Aug. 3, 1984), *aff'd on other grounds*, 770 F.2d 984 (11th Cir. 1985).

COUNT II AND NEGLIGENCE

An action in negligence lies when a duty recognized by law is breached. *Bondu v. Gurvich*, 473 So.2d 1307 (3d D.C.A.), *review denied, Cedars of Lebanon Hosp. Care Center, Inc. v. Bondu*, 484 So.2d 7 (Fla. 1984). If there is no legal duty there can be no cause of action for breach. *Rishel v. Eastern Airlines, Inc.*, 466 So.2d 1136 (3d D.C.A. 1984).

Plaintiffs' claim, in effect, is a "crashworthiness" claim based upon enhancement of injuries due to the failure of the Defendants to install airbags. Plaintiffs assert that Defendants' duty of reasonable care includes the duty to install airbags, because it is foreseeable that some people won't wear seat belts and it is resonable to install airbags as protection for these people. Plaintiffs argue that Defendants' failure to install airbags is a breach of the duty Defendants owe Plaintiffs.

Florida recognizes a cause of action based upon the concept of "crashworthiness." The "crashworthiness" doctrine states that a manufacturer of a vehicle may be liable for defects in the vehicle which cause injury but are not the cause of the primary collision. The standard of care in "crashworthiness" cases is that of eliminating unreasonable risks of foreseeable harm. *Ford Motor Co. v. Evancho*, 327 So.2d 201 (Fla. 1976).

While recognizing the "crashworthiness" doctrine, the Florida courts have reiterated that manufacturers are not insurers, nor do manufacturers have a duty to design a

"foolproof" vehicle. *Evancho, supra,* at 204. The duty is simply to exercise reasonable care.

The court finds that Florida would hold that Defendants in the instant cause have satisfied their duty of reasonable care by installing seat belts. While it may be foreseeable that some people will choose not to use a seat belt installed for their protection, it is not unreasonable for Defendants to install seat belts instead of airbags. Plaintiffs' argument amounts to imposition of a duty to "foolproof" a vehicle. The Florida Supreme Court has rejected this argument. *Evancho, supra.* Count II is therefore DISMISSED.

COUNT III AND "JOINT LIABILITY"

'Joint liability," as defined in Plaintiffs' cited case, *Hall v. E.I. DuPont De Nemours & Co.*, 345 F.Supp. 353 (E.D.N.Y. 1977), states an exception to the general rule that a plaintiff in a tort action must show that the particular defendant sued actually caused plaintiff's injury. *See Salinetro v. Nystrom,* 341 So.2d 1059 (3d D.C.A. 1977). Under the concept of "joint liability" as expressed in *Hall,* a plaintiff need not show that the particular defendant sued caused plaintiff's harm if three elements are met: (1) the product causing plaintiff's injury must be fungible, (2) the individual manufacturer must be unidentifiable, and (3) industry-wide standards must exist to support a finding of joint control.

If all three elements are satisfied, a plaintiff may sue all manufacturers. The burden is on the individual manufacturer to show that he did not make the product which injured plaintiff.

By *Hall's* own requirements, Plaintiffs' count in "joint liability" in the instant cause must fail. Plaintiffs admit knowledge of the identity of the manufacturers of the vehicles in which the named Plaintiffs were injured.

The court finds that, even assuming Florida would recognize a cause of action for "joint liability" as expressed in *Hall*, supra, Plaintiffs have failed to state a claim because Plaintiffs know the identity of the manufacturers. In *Celotex Corp. v. Copeland*, 471 So.2d 533 (Fla. 1985), the Florida Supreme Court rejected an action in "market share liability" when the plaintiff could identify the manufacturer. "Market share liability" is similar to "joint liability" except that "market share" does not require a showing of industry-wide standards. *Conley v. Boyle Drug Co.*, 477 So.2d 600, 604 (4th D.C.A. 1985).

Further, in *Conley, supra*, the 4th District held that Florida did not recognize "market share liability" even when the plaintiff could not identify the manufacturer. *Accord, Morton v. Abbott Laboratories*, 538 F.Supp. 593 (M.D. Fla. 1982).

The Court finds that Florida would not recognize a cause of action in "joint liability" when the plaintiff can identify the manufacturer. Count III is therefore DISMISSED.

Fourth, Plaintiffs' Fifth Amended Complaint must be dismissed for lack of standing as against those Defendants who did not manufacture the vehicles in which the named Plaintiffs were injured.

Plaintiffs' Fifth Amended Complaint sues the following Defendants: American Motors Corp., Chrysler Corp., Toyota Motor Sales U.S.A., Inc., Volkswagen of America, Inc., Nissan Motor Corp. in U.S.A., Ford Motor Co., American Honda Motor Co., Inc./Honda Motor Co., Ltd., and General Motors Co. Of these eight defendants, only Ford, Honda and GM manufactured a vehicle in which a named plaintiff was riding.

The judicial power of the federal courts is limited by the United States Constitution to the resolution of "cases" and "controversies." U.S. Const. Art. III, Sec. 2. One aspect

of Art. III's case or controversy limitation is the requirement of standing. *Valley Forge Christian College v. Americans United for Separation fo Church and State*, 454 U.S. 464 (1982). Standing requires that a plaintiff show "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge, supra*, at 472 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

In the instant cause, Plaintiffs can show no injury by any Defendants other than Ford, Honda and GM. Plaintiffs admit that only Ford, Honda and GM manufactured the vehicles in which the named Plaintiffs were injured. Therefore, as to all Defendants except Ford, Honda and GM, Art. III mandates that Plaintiffs' Fifth Amended Complaint be DISMISSED.

As to Ford, Honda and GM, Plaintiff Taylor was allegedly injured by GM, Plaintiff Ziemba by Ford and Plaintiff Evans by Honda. Each of these three named Plaintiffs may have standing to sue the particular manufacturer of the vehicle alleged to have caused the injury, but the named Plaintiffs have no standing to sue the manufacturer of a vehicle alleged to have injured another named Plaintiff. Therefore, Plaintiff Taylor's Complaint against all Defendants but GM is DISMISSED; Plaintiff Ziemba's Complaint against all Defendants but Ford is DISMISSED; and Plaintiff Evans' Complaint against all Defendants but Honda is DISMISSED.

Plaintiffs argue that the named Plaintiffs' lack of standing to sue as individuals is or should be no bar to the named Plaintiffs maintaining this action as a class action. It is elementary that a plaintiff without standing in his own right cannot represent a class. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 n. 20 (1976). The class action device does not alter the standing requirement. Named plain-

tiffs claiming to represent a class must show that the named plaintiffs personally have been injured by the defendant(s). *Id.*

Plaintiffs in the instant cause cannot bring this aciton as a class action because Plaintiffs lack standing in their individual capacities. Plaintiffs' Complaint is therefore DISMISSED.

In summary, Plaintiffs' Fifth Amended Complaint is dismissed for (1) lack of subject matter jurisdiction (2) failure to satisfy the requirements of Rule 23(b)(3), (3) failure to state a claim under Florida law, and (4) lack of standing.

The court notes that the Plaintiffs have attempted six times to formulate a statement of Plaintiffs' Complaint. Regarding the particular problem of lack of subject matter jurisdiction, this court by order of November 29, 1984, dismissing Plaintiffs' Second Amended Complaint, clearly brought to Plaintiffs' attention the basic jurisdictional defect in Plaintiffs' failure to show a class wherein each member had a claim in excess of $10,000.00. Three Amended Complaints later, Plaintiffs still have not shown a class over whom this court has jurisdiction.

Plaintiffs' difficulties in satisfying subject matter jurisdiciton appear to this court to be insuperable. The court also believes that the lack of standing and the failure to state a claim are similarly unsolvable. The ends of justice would not be served by further attempts to do what this court believes cannot be done. Accordingly, Plaintiffs' Fifth Amended Complaint is DISMISSED WITH PREJUDICE.

DONE AND ORDERED this 25 day of August, 1987.

/s/
NORMAN C. ROETTGER, JR.
UNITED STATES DISTRICT JUDGE

CC: Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.87-5829

JODIE ZIEMBA,

Plaintiff,

EMMA TAYLOR, as Personal Representative of Estate of Charles E. Taylor and CHARLES EVANS, as Personal Representative of Estate of Paula Evans,

Plaintiffs-Appellants,

versus

FORD MOTOR COMPANY, et al,

Defendants,

GENERAL MOTORS CO., INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion_____, 11 Cir., 198__, F.2d.__).
August 28, 1989

Before TJOFLAT, FAY and EDMONSON, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

8-28-89

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 28, 1980
MIGUEL J. CORTEZ
CLERK

APPENDIX B

EDITORIAL NOTES: The effectiveness of certain provisions in this standard 208 relating to seat belt comfort and convenience have been delayed until September 1, 1985. See the "Effective Date Note" appearing at the end of the standard for the text currently in effect.

For compliance dates relating to automatic occupant restraint requirements, see "Editorial Note 2" appearing at the end of this standard.

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9., *Pressure vessels and explosive devices,* applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash.

S4. *General requirements.*

S.4.1 *Passenger cars.*

S4.1.2. *Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986.* Each passenger car manufactured on or after September 1, 1973, and after September 1, 1986, shall meet the requirements of S4.1.2.1. S4.1.2.2 or S4.1.2.3. A protection system that meets the re-

quirements of S4.1.2.1 or S4.1..2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option—frontal/angular automatic protection system. The vehicle shall:*

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) *Either.* (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehic le occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 200 and S7.1 through S7.3, and that meets the requirements of S5.1 with fron test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (of the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second option—head-on automatic protection system.* The vehicle shall—

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 l seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 *Third option—lap and shoulder belt protection system with belt warning.*

S41231 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3 The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2. Convertibles and openbody type vehicles shall lat each designated seating position ohave a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.